**Rel: September 4, 2020**



# SUPREME COURT OF ALABAMA

**SPECIAL TERM, 2020**

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**1190400**

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**Laura Casey**

**v.**

**Chris "Chip" Beeker, Jr., Twinkle Andress Cavanaugh, and Jeremy H. Oden, in their official capacities as commissioners of the Alabama Public Service Commission**

**Appeal from Montgomery Circuit Court**
**(CV-19-902205)**

SELLERS, Justice.

Laura Casey appeals from a judgment entered by the Montgomery Circuit Court in Casey's action against Chris "Chip" Beeker, Jr., Twinkle Andress Cavanaugh, and Jeremy H.

Oden ("the commissioners"), in their official capacities as commissioners of the Alabama Public Service Commission ("the PSC"). In her complaint, Casey asserted that a gathering of the commissioners at a public hearing held by the PSC in November 2019 constituted a "meeting" under the Alabama Open Meetings Act, § 36-25A-1 et seq., Ala. Code 1975 ("the Act"). She alleged that proper notice of the hearing was not given as required by the Act and that she was prohibited from recording the hearing in violation of the Act. The trial court, however, ruled that a "meeting" had not occurred at the hearing and that the Act therefore does not apply. We affirm.

Section 37-1-83, Ala. Code 1975, which is part of the statutory scheme governing the PSC, requires the PSC to investigate complaints of unfair utility rates. It also provides that "no order affecting such [utility] rates ... shall be entered by the [PSC] without notice and a hearing." In addition, § 37-1-96, Ala. Code 1975, provides that "[n]o order shall be made by the [PSC] affecting any rate or service, except as otherwise specifically provided, unless or until a public hearing has been held in accordance with the provisions of [Title 37]."

Two individuals, James Bankston and Ralph Phifer, filed a complaint with the PSC regarding Alabama Power Company's "capacity-reservation charges," which are purportedly aimed at enabling Alabama Power to recover the costs associated with serving the backup-power needs of customers with "onsite interconnected generation." Bankston and Phifer complained specifically about charges levied against Alabama Power customers who generate their own electricity through the use of solar panels. According to a representative of Alabama Power, its capacity-reservation charges allow Alabama Power to recover the cost of "reserving" backup electricity for customers whose solar panels are not producing enough power. The Alabama Attorney General's Office and two nonprofit organizations, G.A.S.P. and Energy Alabama, intervened in the proceedings.

On November 21, 2019, the PSC held a public hearing regarding the capacity-reservation charges. Pursuant to § 37-1-89, Ala. Code 1975, the PSC appointed an administrative law judge to preside over the hearing. Notice of the hearing, in the form of an order of the administrative law judge setting a hearing date, was posted in advance on the PSC's Web site.

The hearing was widely attended. Although all three PSC commissioners attended the hearing, affidavits submitted to the trial court indicate that there was no prearranged plan to have a quorum of the PSC present.

Casey, a resident of Shelby County, attended the PSC hearing. Using her cellular telephone, Casey began to record the hearing. The record suggests that she may have also simultaneously "streamed" the hearing over the Internet. Before the hearing was over, the administrative law judge stated:

> "I continue to hear the chirping of an electronic device. It's annoying the heck out of me and it's taking away my focus. If anybody's streaming this proceeding, shut it down right now. We don't record proceedings. We don't stream live hearings here at the Commission. Any live streaming needs to be shut down right now. It's not permitted. If that's what I'm hearing, the chirping, that needs to stop ...."

Casey alleges that, after the administrative law judge's comments, her cellular telephone was confiscated and she was escorted out of the proceedings and was not allowed to return until she agreed to stop recording.[1]

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[1]Nothing in the appellate record indicates that the "chirping" heard by the administrative law judge was coming from Casey's phone. The trial court did not determine that Casey was disruptive, and the commissioners have abandoned any reliance on that ground. The Court also notes that the

Section 36-25A-9, Ala. Code 1975, allows for civil actions alleging violations of the Act. Interested parties can sue members of a governmental body, in their official capacities, who remain in attendance at a meeting allegedly held in violation of the Act. Pursuant to that Code section, Casey sued the commissioners, averring that they had violated the Act by failing to give the notice called for by the Act and by preventing Casey from recording the hearing.

The parties submitted legal briefs and documentary evidence to the trial court. After hearing arguments, but without receiving any oral testimony, the trial court entered a final judgment in favor of the commissioners. In support of its judgment, the trial court ruled that the Act did not apply here because the gathering of the commissioners at the PSC hearing was not a "meeting" that would trigger applicability of the notice and recording provisions of the Act. Casey appealed.

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parties have not pointed to any express statutory prohibition on recording public hearings of the PSC. Casey, however, relies only on a provision of the Act allowing the recording of meetings. She has not pleaded any other legal basis supporting her claim that she had a legal right to record the PSC hearing.

The parties agree that this Court should apply a de novo standard of review. See Alfa Mut. Ins. Co. v. Small, 829 So. 2d 743, 745 (Ala. 2002) ("[W]here there are no disputed facts and where the judgment is based entirely upon documentary evidence, no ... presumption of correctness applies [to the trial court's judgment]."). See also Pitts v. Gangi, 896 So. 2d 433, 434 (Ala. 2004) (noting that questions of statutory interpretation are subject to de novo review on appeal). Under the Act, Casey had the burden of demonstrating by a preponderance of the evidence that a "meeting" occurred and that the provisions of the Act were violated. See § 36-25A-9(b), Ala. Code 1975 (stating in part that, at a preliminary hearing on a complaint alleging a violation of the Act, "the plaintiff shall establish by a preponderance of the evidence that a meeting of the governmental body occurred and that each defendant attended the meeting"); § 36-25A-9(e), Ala. Code 1975 (requiring a trial court to enter a final judgment against a defendant in an Open Meetings Act case "[u]pon proof by a preponderance of the evidence of a defendant's violation of [the Act]").

Section 36-25A-1(a), Ala. Code 1975, provides, with some exceptions not applicable here, that "no meetings of a governmental body may be held without providing notice pursuant to the requirements of Section 36-25A-3[, Ala. Code 1975]." (Emphasis added.) As for recording a meeting, § 36-25A-6, Ala. Code 1975, provides, in part:

> "A meeting of a governmental body, except while in executive session, may be openly recorded by any person in attendance by means of a tape recorder or any other means of sonic, photographic, or video reproduction provided the recording does not disrupt the conduct of the meeting."

(Emphasis added.)

There is no dispute in this case that the PSC is a "governmental body" under the Act. See § 36-25A-2(4), Ala. Code 1975 (defining "governmental body"). The dispute is whether a "meeting" occurred during the PSC hearing. On appeal, Casey relies on the following definition of "meeting":

> "(6) Meeting. a. Subject to the limitations herein, the term meeting shall only apply to the following:
>
> "....
>
> "3. The gathering, whether or not it was prearranged, of a quorum of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the

> exchange, the participating members expect to come before the full governmental body at a later date."

§ 36-25A-2(6)a.3., Ala. Code 1975. In the present case, whether a "meeting" occurred at the hearing depends on whether the commissioners "deliberated" a matter at the hearing that they expected to come before the PSC at a later date. It is not contested that the commissioners expected Alabama Power's capacity-reservation charge to come before the PSC at a later date. Thus, whether a meeting occurred depends on whether the commissioners "deliberated" that matter at the hearing.[2]

Although the Act defines the term "deliberation," § 36-25A-2(1), Ala. Code 1975, Casey argues that this Court, in determining whether the commissioners deliberated at the PSC hearing, should not consult that definition. Rather, she asserts that we should apply Merriam-Webster's definition of "deliberate," which is "to think about or discuss issues and decisions carefully." Merriam-Webster's Collegiate Dictionary 329 (11th ed. 2020) (emphasis added). We disagree. The Act

[2]In her complaint and in the trial court, Casey cited additional definitions of "meeting" that are set out in § 36-25A-2(6)a., Ala. Code 1975, which refer to "prearranged" gatherings of quorums but do not require deliberation. On appeal, Casey has abandoned reliance on those definitions.

uses the terms "deliberative," "deliberate," and "deliberation." See § 36-25A-1(a), Ala. Code 1975 ("It is the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings ...."); § 36-25A-2(6), Ala. Code 1975 (defining "meeting" in part as a gathering of a quorum of a governmental body where the members of the quorum "deliberate" a matter they expect to come before the full governmental body); § 36-25A-7(a)(3), Ala. Code 1975 (stating that, if, during an executive session where litigation against a governmental body is discussed with counsel, "deliberation begins among the members of the governmental body regarding what action to take relating to pending or threatened litigation based upon the advice of counsel, the executive session shall be concluded and the deliberation shall be conducted in the open portion of the meeting or the deliberation shall cease"). Thus, among other things, the Act is aimed at making the "deliberative process" transparent and open to the public during "meetings," which include gatherings at which governmental bodies "deliberate." It also requires transparency when "deliberation" occurs during an executive session where

litigation is discussed with counsel. It is obvious to the Court from the entirety of the Act and from the definition of "deliberation" that that term refers to the act of deliberating. In other words, it defines what it means to "deliberate." Accordingly, the term "deliberate" should be defined based on the statutory definition of "deliberation" found in the Act. Cf. State v. Schmid, 859 N.W.2d 816 (Minn. 2015) (construing the statutory term "take," which was not expressly defined in the statute, according to the statutory definition of "taking" that was set forth in the same statutory scheme). Indeed, Casey's argument on this point conflicts with Swindle v. Remington, 291 So. 3d 439 (Ala. 2019), discussed more fully below, in which this Court consulted the statutory definition of "deliberation" in determining whether the members of a governmental body had "deliberated" and had therefore held a "meeting."

"Deliberation" is defined in the Act as:

> "An exchange of information or ideas among a quorum of members of a subcommittee, committee, or full governmental body intended to arrive at or influence a decision as to how any members of the subcommittee, committee, or full governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the subcommittee, committee, or full

> body immediately following the discussion or at a later time."

§ 36-25A-2(1), Ala. Code 1975. Two witnesses testified during the PSC hearing. The first, Natalie Dean, is a "regulatory pricing manager" for Alabama Power. She testified regarding the purpose of the capacity-reservation charge, the amount of the charge, how the charge is calculated, and the effect solar-panel usage might have on Alabama Power's costs and its ability to serve its customers. Dean's testimony was provided in response to questioning by Alabama Power, by the parties who had initiated the proceedings, and by intervenors with interests in the subject matter of the proceedings.

The other witness to testify was Karl Rabago, an expert called by G.A.S.P., one of the intervenors in the proceedings. Rabago addressed the commissioners directly with a lengthy summary of what appears to be previously given deposition testimony. According to Rabago, the capacity-reservation charges "eliminate much of the savings that [solar] customers expect to realize from their investments [in solar panels]" and are "punitive, discriminatory, and unlawful." None of the other parties cross-examined Rabago.

Nothing in the transcript of the hearing indicates that the commissioners themselves participated in the exchange of relevant and substantive information during the hearing. Rather, it appears that they listened passively to the information provided by the parties in attendance. At the conclusion of the hearing, the administrative law judge stated that the commissioners and the PSC staff members would "evaluate ... the additional testimony that's been provided today, and then a decision will be rendered at the appropriate time ... at an open meeting of the [PSC]."

It is not contested that, at the hearing, information was presented that was intended to influence the commissioners' ultimate decision regarding the propriety of Alabama Power's capacity-reservation charge. The issue is whether that information was exchanged "among" the commissioners. § 36-25A-2(1), Ala. Code 1975 (deliberation occurs when there is "[a]n exchange of information or ideas among a quorum of members").

Casey points to the first definition of "among" in Merriam-Webster's dictionary, which is: "in or through the midst of: surrounded by." Merriam-Webster's Collegiate

Dictionary 41 (11th ed. 2020). Merriam-Webster provides the following example of a specific use of the term "among" Casey urges: "hidden among the trees." Id. Merriam-Webster also provides another similar definition of "among": "in company or association with," and gives "living among artists" as an example of that usage. Id. According to Casey, the commissioners "sat in the midst (the middle) of the parties' exchange of ideas and information intended to influence the [commissioners'] future vote." In other words, Casey asserts that the exchange of information and ideas "among a quorum" of a governmental body means the exchange of information and ideas in the quorum's presence. She suggests that construing the Act in any other way would allow members of governmental bodies to avoid the application of the Act simply by remaining silent at gatherings where information and ideas are presented to them.[3]

[3]There is no discussion in Casey's appellate briefs of the definitions of "meeting" that refer to "prearranged gatherings" of quorums but that do not mention deliberation. We are not tasked in this case to decide whether, under those definitions, a gathering such as Casey hypothesizes, where members of a governmental body do not speak, could still be a "meeting" under the Act.

"Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning ...." IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992). In this Court's view, in the context in which the term "among" is used in the statute, the ordinary and commonly understood meaning is more closely embodied by another definition of "among" provided by Merriam-Webster: "through the reciprocal acts of." Merriam-Webster's Collegiate Dictionary 41 (11th ed. 2020). An example of a use of that definition given by Merriam-Webster is: "quarrel among themselves." Another apt example given by counsel for the commissioners during oral argument before this Court is: "a discussion among the guests."

The Court is not writing on a clean slate with respect to this issue. In Swindle v. Remington, supra, the Court considered whether a particular private gathering of the board of the Public Education Employees' Health Insurance Program ("PEEHIP") and PEEHIP staff members constituted a meeting under the Act. At a private "morning" session, a PEEHIP budget shortfall was addressed, and PEEHIP staff members recommended to the board that it fill the shortfall by

increasing insurance premiums and spousal surcharges for insurance coverage, which were matters the board was slated to vote on at a later public "afternoon" session. Although this Court concluded that a meeting had indeed occurred at the morning session, the act of providing information to the PEEHIP board members during that session was not, by itself, enough to establish that a meeting had occurred. 291 So. 3d at 460 ("[D]uring the [private] session, [PEEHIP] staff recommended the Board's adoption of the proposed increases. The primary question, however, is whether the Board engaged in any specific 'deliberation' regarding the staff's recommendations.").

There was more to the private morning session than just the provision of information to the PEEHIP board. There was testimony that, during the morning session, "'various [Board] members shared thoughts and views on the [matter to be voted on later], through discussion, questioning and otherwise.'" 291 So. 3d at 443. In concluding that "deliberation" had occurred at the morning session, this Court observed:

> "Board members asked questions about the proposals [to be voted on during the afternoon session] and ... at least one member openly disagreed with the recommendations and advocated for an alternative

> solution. ... [Two Board members] stated that the members shared their 'thoughts and views' on the proposed increases [in premiums and surcharges] and ... there was discussion about the staff's recommendations. Although the other Board members provided statements alleging that they did not exchange information or ideas during the meeting, it is evident that the opinions of some of the Board members were expressed during the morning session. During both the morning and afternoon sessions, [one Board member] advocated for the use of [a] trust fund to fill the economic shortfall [facing PEEHIP's budget]. ... [T]he chair of the Board, along with PEEHIP officials, scheduled the morning session with general knowledge of the proposals to be presented by staff, and Board members asked questions regarding the staff's proposals to increase premiums, an item the members knew would be considered for a vote later that day. In addition, during the morning session, [one Board member] read and 'someone mentioned' a recently enacted Senate resolution that suggested that an increase in PEEHIP premiums would be inappropriate in light of recent legislation providing an increase in public-education employees' salaries. This Court therefore must conclude that, under these particular circumstances, 'deliberation' occurred during the morning session."

291 So. 3d at 461 (footnote omitted). The Court in Swindle also noted that questions asked by the members of a governmental body could be posed in such a way as to "influence those around him or her to vote a certain way." Id. at 460.

Under the reasoning of Swindle, in order to prove that a "meeting" occurred at the PSC hearing, Casey must demonstrate

that the commissioners exchanged information and ideas with each other and that their doing so was aimed at arriving at or influencing the commissioners' ultimate decision on the capacity-reservation charges. In her appellate brief, Casey points out that the commissioners sat at the bench during the PSC hearing, that expert testimony regarding the capacity-reservation charges was heard by the commissioners, that the commissioners "could have asked questions" if they had wanted to, and that one of the commissioners "instructed the public to follow the [administrative law judge's] directions not to record the hearing." These facts are not sufficient to establish that the commissioners deliberated and that a meeting took place under the Act.[4]

The trial court did not err in determining that the gathering of the commissioners at the November 21, 2019, PSC

[4]The Court does not hold that the members of a governmental body necessarily have to address one another directly in order to "deliberate." As the Court acknowledged in Swindle, the exchange of information and ideas among members of a governmental body can be accomplished in other ways. The example given in Swindle was the posing of questions by members that is intended to influence a vote. There could be other examples. Nothing, however, in the present case indicates that the commissioners exchanged any relevant information, much less relevant ideas, during the hearing.

hearing was not a "meeting" under the Act. Accordingly, we affirm the trial court's judgment.

AFFIRMED.

Bolin, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur.

Parker, C.J., concurs specially.

Shaw, J., concurs in the result.

Wise, J., recuses herself.

PARKER, Chief Justice (concurring specially).

I concur fully with the main opinion. I write specially to address a point argued by Laura Casey's counsel, at oral argument before this Court, regarding the appropriateness of applying a statutory definition of one form of a word to another form of that word used in the statute.

The outcome in this case depends partly on whether the Open Meetings Act's definition of the noun "deliberation" in § 36-25A-2(1), Ala. Code 1975, controls the meaning of the verb "deliberate" in § 36-25A-2(6). At oral argument, Casey's counsel stated that there is "no legal authority that suggests that when you have a statutorily defined noun, that you're supposed ... to impose that definition on a verb." Because counsel's improvident assertion relates both to an issue that is pivotal to the case before us and to broader principles of legal argument, I take this opportunity both to explore the nature of "legal authority" and to point out the particular authorities that support this Court's commonsense approach to the linguistic question raised in this appeal.

## I. Legal authorities in general

"In each case, [a court] must support its action by reciting legal rules that mesh adequately with the existing

order." Reed Dickerson, The Interpretation and Application of Statutes 14 (1975). Consequently, attorneys arguing before a court present legal rules that favor their respective clients' positions, in support of which they will find it necessary to provide legal authority. In this role, attorneys should aspire to "recognize the existence of pertinent legal authorities." Comment to Rule 3.3, "Misleading Legal Argument," Ala. R. Prof. Cond.[5] Particularly in cases in which this Court grants oral argument, it is typical for there to be no statute or controlling precedent that squares neatly with the facts and issues of the case at hand. When faced with this problem, attorneys must apply legal reasoning to information from other sources. To do so effectively, attorneys must recognize the breadth of potential sources, as well as their usefulness for persuasion. In almost every instance, there will be some legal authority that sheds light on the issue before the Court.

[5]I do not suggest that attorneys behave unethically by failing to identify or acknowledge noncontrolling authorities, but only that attorneys do have a duty to ensure the accuracy of any representation that no legal authority exists that supports a proposition that favors the opponent. It is one thing not to disclose noncontrolling authority that supports one's opponent; it is quite another to affirmatively state that such authority does not exist.

Every legal authority has two characteristics that determine its role in constructing an argument: type and weight. There are two types of legal authority: primary and secondary. In general, primary authority is law and official interpretations of it, for example, constitutions, statutes, local ordinances, executive orders, administrative regulations, court rules, and judicial decisions. Primary authority includes all official pronouncements of a governing body or individual that enact, interpret, or apply a law or legal principle. All primary authorities purport to be binding on someone, or did at one time.[6] All authorities that are not primary are secondary authorities, that is, unofficial commentary on the law. For example, good attorneys are familiar with their jurisdiction's leading treatises and periodicals pertaining to their area of practice. Other secondary sources, such as practice manuals and desk books, legal dictionaries and encyclopedias, continuing-legal-education materials, and Internet sources can

[6]Plurality opinions, concurring opinions, dissenting opinions, and dicta, though generally nonbinding in the sense that they do not contain a court's holdings, are primary authority because they are parts of official, binding pronouncements. Unlike holdings in majority opinions, however, they are persuasive rather than mandatory. See infra.

inform attorneys' decisions of how to advise a client or build an argument.

Additionally, every authority has one of two weights: mandatory or persuasive. Mandatory authority is authority that a court must follow. Persuasive authority is authority that a court need not follow but that may be used to persuade the court. Only primary authorities can be mandatory, and primary authorities that are not mandatory are persuasive. All secondary authorities are persuasive authorities. Further, the weight of mandatory authorities does not vary: a mandatory authority must be followed. By contrast, some persuasive authorities are more persuasive than others. How persuasive such an authority is depends on many factors, such as the relevance of the commentary, the expertise of the author, and the age of the source. Particularly with respect to persuasive primary authority (e.g., nonbinding judicial statements), an authority's persuasive value is impacted by the relative positions, within the judicial hierarchy or other governmental structure, of the author and the decision-maker being persuaded.

Many attorneys seem to have little difficulty ascertaining the weight of primary authority. That is good,

because legal arguments must cite applicable law, and legal conclusions must follow from law and its principles. Consequently, no argument should rest solely on persuasive authority if mandatory authority exists. Put another way, attorneys must acknowledge mandatory authorities, even if persuasive authorities better support their arguments. Further, attorneys cannot depend solely on secondary authority if there is primary authority available.

Some attorneys, however, have the opposite habit: They rely on primary authority to the near-total exclusion of secondary authority. Presumably, this habit has been fostered by the case method of legal education, which has held ascendancy in law schools across the nation for many decades, since shortly after Harvard Law School Dean Christopher Columbus Langdell introduced it in the latter half of the 19th century. See Marie Summerlin Hamm et al., The Rubric Meets the Road in Law Schools: Program Assessment of Student Learning Outcomes as a Fundamental Way for Law Schools to Improve and Fulfill their Respective Missions, 95 U. Det. Mercy L. Rev. 343, 354-57 (2018); David D. Garner, The Continuing Vitality of the Case Method in the Twenty-First Century, 2000 BYU Educ. & L.J. 307, 316-23 (2000); W. Burlette

Carter, Reconstructing Langdell, 32 Ga. L. Rev. 1, 48-53 (1997) (discussing Langdell's de-emphasis of secondary sources in legal education). As a result of Langdell's influence, legal education places heavy emphasis on distilling and synthesizing rules announced in judicial opinions. Law students may receive an introduction to secondary sources in a first-year legal-research course, but they are rarely called upon to use them in any other context. This case-focused approach has some benefits, such as teaching students to "think like lawyers," see James R. Maxeiner, Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method, 35 Int'l J. Legal Info. 1, 1 (2007), but it also conditions them to overlook -- and undervalue -- the wealth of information that experts have already compiled and condensed to aid understanding and guide research. In addition, the rise of electronic legal-research tools, with their increasingly advanced search capabilities and (more recently) artificial intelligence, has diminished the perceived value of secondary sources, particularly as aids in finding primary authority. It is easy to be lulled into complacency by the power of those tools and forget that the "universal search box" does not have access to the universe of legal

information. No single method, industry practice, or tool defines the outer limit of the source types that may inform attorneys' arguments and help them fulfill their obligations of effective advocacy and candor to the court. Although attorneys are not expected to digest all possible sources that may comment on a given issue, they would do well to draw on the wide variety of credible authorities available to them -- especially when arguing appeals.

With this context in mind, I return to the legal issue at hand.

## II. Legal authorities on using definitions across word forms

### A. Primary sources

An abundance of judicial decisions support the Court's holding that "the term 'deliberate' should be defined based on the statutory definition of 'deliberation' found in the [Open Meetings] Act." ___ So. 3d at ___. For example, this Court's handling of the word "deliberate" in Swindle v. Remington, 291 So. 3d 439 (Ala. 2019), is fully consistent with today's holding. Another supporting decision the Court cites is State v. Schmid, 859 N.W.2d 816 (Minn. 2015), in which the defendant had been convicted under a Minnesota law that "state[d] that a person may not 'take' deer without a license." Id. at 817.

The state's fish and game laws defined the noun "taking" but not the verb "take." Id. at 820. The court construed "take" according to the definition of "taking":

> "'Taking,' as defined [by the statute], can be used as a verb, noun, or adjective. When 'taking' is used as a verb it has the same underlying definition as the root verb 'take.' ...
>
> "Further, when 'taking' is used as a gerund or adjective, the difference is not definitional, but syntactical. The verb form is an action performed by a subject, modifiable by adverbs, while the noun form identifies the action as the object of a verb, modifiable by adjectives. Thus, when 'take' and 'taking' are used in the same context, they have the same basic definition. They are merely different syntactical forms of the same word."

Id. at 820-21 (citations omitted).

Swindle and Schmid are far from the only cases that support the Court's application of a definition of a noun to its verb form. In an opinion construing Texas's Open Meetings Act, the Texas Court of Criminal Appeals responded skeptically to the State's argument that the statutory verb "meeting" had a different meaning from the defined noun "meeting." Texas v. Doyal, 589 S.W.3d 136, 143 n.25 (Tex. Crim. App. 2019) ("It could be argued that the verb 'meeting' would be the act of holding a 'meeting' -- so that the noun definition would inform the meaning of the verb."). Additionally, decisions of

the United States Supreme Court and the United States Court of Appeals for the 11th Circuit indicate that it is appropriate to impute the same essential meaning to different forms of the same word or phrase that occur in the same legislation. See, e.g., Astrue v. Ratliff, 560 U.S. 586, 592 (2010) (declining to interpret the noun "award" as having a different meaning from the verb "award" because "[t]he transitive verb '"award"' has a settled meaning in the litigation context"); Reves v. Ernst & Young, 507 U.S. 170, 178 (1993) ("We conclude ... that as both a noun and a verb in this subsection 'conduct' requires an element of direction."); Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 142 (2011) (explaining that pairing the verb "make" with a noun results in a phrase approximately equivalent in meaning to the verb form of the noun: "'To make any ... statement,' is thus the approximate equivalent of 'to state.'"); United States v. Caniff, 955 F.3d 1183, 1189 (11th Cir. 2020) (concluding that the phrase "'to make any notice' simply means 'to notify'").

Similarly, the courts of this State have concluded that the meaning of a noun informs the meaning of its verb form, and vice versa. See, e.g., Randolph v. Yellowstone Kit, 83 Ala. 471, 472, 3 So. 706, 707 (1888) (inferring meaning of

noun "peddler" from verb "peddle"); Bank of Florala v. Smith, 11 Ala. App. 358, 359, 66 So. 832, 832 (1914) ("[T]he word 'mortgage,' when employed without qualification in [a conveyance], whether as a verb or as a noun ..., ... is construed to mean and accomplish what formal terms creating a mortgage would have accomplished ...." (emphasis added)).

B. Secondary sources

Further support for the Court's use of the definition of "deliberation" across word forms exists in secondary authorities regarding principles of statutory interpretation. For example, a legislature communicates "according to accepted standards of communication" existing at the time of the enactment. Dickerson, supra, at 11, 273. Thus, courts presume that the "drafters [of legislation] ... are ... grammatical in their compositions." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 140 (2012). That is, ordinarily, "[w]ords are to be given the meaning that proper grammar and usage would assign them." Scalia & Garner, supra, at 140; see Nielsen v. Preap, __ U.S. __, __, 139 S. Ct. 954, 965 (2019) (applying this principle and holding "that the scope of 'the alien' is fixed by the

predicate offenses identified in [the preceding] subparagraphs").

One remarkable characteristic of English grammar and usage is that the same word can often function as many different parts of speech. See Bryan Garner, Garner's Modern English Usage 416 (4th ed. 2016) ("Renaissance rhetoricians called [this characteristic] enallage ..., and some modern grammarians call it transfer: the ability of a word to shift from one grammatical function to another."). A word that is normally a noun may serve as an adjective and vice versa. With only a slight change of spelling and sentence structure, a noun becomes a verb. Many such "functional shifts," also called "semantic shifts," are possible and normally acceptable. See id. at 416-18. Pertinently here, a noun may be used as a verb. Although stylistically legal-writing experts tend to frown on such "nominalization" that creates a "buried verb" or "zombie noun," their criticism inherently recognizes that the two forms are functionally interchangeable in relation to meaning. See Bryan A. Garner, Garner's Modern American Usage 120 (3d. ed. 2009); Modern English Usage, supra, at 983; Jason Dykstra, To Verb or Not to Verb, 56 Advocate 49 (2013); Bryan A. Garner, Legal Writing in Plain

English 38-39 (2001). This interchangeability has given rise to what one scholar has labeled the "Consistency Principle": "When a word is used as both a noun and a verb in a single statutory statement, that word should be construed similarly in each instance." Alani Golanski, Linguistics in Law, 66 Alb. L. Rev. 61, 94 (2002).

## III. Conclusion

From this brief survey, it is evident that a plethora of legal authorities, both primary and secondary, support the Court's use of the statutory definition of the noun "deliberation" to understand the meaning of its verb form "deliberate." More importantly, this case illustrates the danger of attorneys assuming an overly restrictive understanding of the scope of legal authority. Attorneys throughout the State would do well to both recognize and employ the full range of sources at their disposal under the rubric of "legal authority."

SHAW, Justice (concurring in the result).

I do not believe that the plain-meaning rule can be used in this case or that the main opinion's statement regarding a definition of the word "among" found in Ala. Code 1975, § 36-25A-2(1), is required. Instead, I believe that the appellant, Laura Casey, has simply failed to prove that the trial court erred, and I would decline at this time to further address the proper meaning and application of the statutes at issue in this appeal. I thus concur in the result.

The issue in this case is whether the Open Meetings Act, Ala. Code 1975, § 36-25A-1 et seq. ("the Act"), governed the Alabama Public Service Commission ("PSC") hearing at issue in this case. The Act applies to "meetings," and that term is specifically defined in Ala. Code 1975, § 36-25A-2(6). The issue on appeal relates to one particular definition of the word "meeting" provided in § 36-25A-2(6)a.3:

> "The gathering, whether or not it was prearranged, of a quorum of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the full governmental body at a later date."

(Emphasis added.)

To decide if the gathering at issue in this case by a quorum of the members of the PSC -- i.e., the hearing -- was a "meeting," we are called upon to determine what it means to "deliberate." The parties offer various dictionary definitions of the word, but I agree with the main opinion that we should resort to the specific definition of the word "deliberation" found in § 36-25A-2(1), which states, in pertinent part:

> "An exchange of information or ideas among a quorum of members of a ... governmental body intended to arrive at or influence a decision as to how any members of the ... governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the ... body immediately following the discussion or at a later time."

(Emphasis added.) As framed by the main opinion, the determinative factor in deciding whether there was a "deliberation" and thus a "meeting" concerns the meaning of the word "among."

The plain-meaning rule requires that "[w]ords used in a statute must be given their natural, plain, ordinary, and commonly understood meaning." IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992). However, if the text is ambiguous, then the plain-meaning rule does not

apply, and this Court resorts to judicial construction to determine its meaning. See id. at 346 ("If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect."), and Deutsche Bank Nat'l Trust Co. v. Walker Cty., 292 So. 3d 317, 326 (Ala. 2019) ("If the language of a statute is not 'plain' or is ambiguous, then -- and only then -- may a court construe or interpret it to determine the legislature's intent.").

The word "among," as the main opinion describes, is capable of different meanings. If "among" can mean both an exchange "between" the members of the quorum and, alternately, an exchange that occurs "in the midst of" or in the "company of" the members, then there are different circumstances in which a "deliberation" occurs and thus a "meeting" exists. Neither of the two competing definitions of the word "among" advanced by the parties nor the resulting changes in meaning of § 36-25A-2(1) and § 36-25A-2(6)a.3 are absurd; both are reasonable readings.

The context of the use of the word "among" does not, for me, show a plain meaning. The "exchange" may be "intended to ... influence a decision as to how any members ... should

vote." Certainly the members can act in the exchange with the intent to influence each other, but this context does not exclude nonmembers from participating in the exchange with the intent to influence the members or indicate that members solely are involved in that process. Influence can be attempted by nonmembers in "the company" of or "in the midst" of the quorum just as well as by members between each other. This is neither unreasonable nor absurd and appears to be precisely what was occurring in this case: dueling viewpoints as to the propriety of a utility charge were being provided to a quorum of the PSC with the apparent intent to influence that body. To me, the context does not show the sole meaning selected by the main opinion.[7]

Because the word "among" is reasonably susceptible to two different definitions in this case, and because the different definitions change the applicability of these Code sections, its meaning is ambiguous and not "plain." Because it is ambiguous, the plain-meaning rule does not apply, and this

[7]This is not to say that merely because a word has more than one definition it is ambiguous. Here, § 36-25A-2(1) can reasonably be read using either definition of the word "among." Nothing in the context suggests that a particular definition is required or is exclusively the natural, plain, ordinary, and commonly understood meaning.

Court must resort to the rules of statutory construction to determine its correct meaning.

However, the parties generally argue on appeal that their own respective proposed meaning of the word "among" is the plain and ordinary meaning and thus do not provide the legal analysis or theories of construction required to resolve the ambiguity I see. Casey does suggest in her brief that the more narrow reading of the word "deliberation" actually adopted by the main opinion "would thwart the Alabama public policy of having the public have open access to the deliberative process." Considering the legislative intent and purpose of a statute is one method of statutory construction when the plain-meaning rule does not apply: "'[When a court] is called upon to construe a statute, the fundamental rule is that the court has a duty to ascertain and effectuate legislative intent expressed in the statute, which may be gleaned from the language used, the reason and necessity for the act, and the purpose sought to be obtained.'" Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998) (quoting Ex parte Holladay, 466 So. 2d 956, 960 (Ala. 1985)).

However, the legislature has already stated the purpose of the Act, and the setting in which the Act applies is more limited than Casey suggests: "It is the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 36-25A-2(6)." Ala. Code 1975, § 36-25A-1(a) (emphasis added). Thus, the stated purpose of the Act is not to provide the public access to all facets of the "deliberative process" generally, as Casey argues, but -- at least under the circumstances addressed in this appeal -- to provide access to only what the legislature has defined as a "meeting" in the first place. This restriction provided by § 36-25A-1(a), which is not ambiguous, has thus limited the broad, general public-policy consideration suggested by Casey as a basis for rejecting the definition put forth by the PSC commissioners. There are numerous methods of statutory construction and policy considerations that may lead a resolution of the proper definition of "among" in different directions; I do not have the benefit of further briefing or argument to engage in that particular analysis when I must choose one reasonable definition over another.

Our caselaw indicates that I cannot provide such an argument to reverse the judgment of the trial court because, "when we are asked to reverse a lower court's ruling, we address only the issues and arguments the appellant chooses to present." Hart v. Pugh, 878 So. 2d 1150, 1157 (Ala. 2003). I universally follow this caselaw to treat fairly all litigants who come before this Court. Further, given that there might be other arguments to show an interpretation of "among" different from that adopted in the main opinion, I would not at this time issue a legal precedent definitively determining the meaning of the word "among" without a more comprehensive argument as to the proper construction of the statutory language.

I note, however, that the main opinion's definition of "meeting" renders a PSC hearing that is required by law to be noticed and open to the public by different statutes[8] to nevertheless escape coverage under the Open Meetings Act. This is particularly troublesome to me. In addition, the result of the main opinion's holding in relation to other gatherings of the members of governmental bodies when, unlike

[8]See Ala. Code 1975, §§ 37-1-83 and 37-1-96.

in this case, the gatherings are not required by other laws to be open to the public, is not clear. Furthermore, the interpretation provided in the main opinion creates uncertainty as to when the Act would apply to some gatherings of members of governmental bodies; specifically, gatherings with no planned deliberation between the members of the quorum and to which the Act would now not apply might be instantly transformed into a "meeting" under the Act by a mere utterance of one of the members. The Open Meetings Act is a creature of the legislature; given the posture of this case, its importance to the public, and the concerns that are apparent to me as a result of the main opinion's holding, I urge that body to move expeditiously to resolve these issues and the ambiguity presented in the Act.